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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1976

No. 75-1546

MRS. ETHEL KNIGHT,
Petitioner,

vs.

E. J. HOLDER, M.D., Individually and E. J. HOLDER, M.D., and JAMES C. BASS, JR., M.D., d/b/a LAUREL BONE AND JOINT CLINIC,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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TABLE OF CONTENTS

	Page
Prayer	1
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reason for Granting the Writ	7
Argument	7
Certificate of Service	13
Appendix	
1—Judgment of the Supreme Court of Mississippi	A-1
2—Notice of Judgment of Supreme Court of Mississippi	A-2
3—Notice of enlargement of time in which to file Petition for Rehearing	A-3
4—Petition for Rehearing	A-5
5—Judgment on Petition for Rehearing	A-7
6—Notice of Judgment on Rehearing	A-8

Table of Cases Cited

Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1935)	7
Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)	7, 8

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Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) 7

Jenkins v. McKeithen, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969) 7

Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, 219 U.S. 35, 55 L. Ed. 78 (1910) 7, 8

Morrissey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) 7

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi affirming the jury verdict and judgment against petitioner in the Circuit Court of the Second Judicial District of Jones County, Mississippi.

OPINION BELOW

There was no opinion delivered by the Supreme Court of Mississippi. Said Court affirmed the jury verdict and judgment of the trial court without opinion and denied petitioner's Petition for Rehearing without opinion. See copies of judgments and notices in the Appendix, *infra*, pp. A-1 to A-8.

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JURISDICTION

The judgment of the Supreme Court of Mississippi was dated and entered on December 22, 1975. A copy of the judgment is set forth in the Appendix herein. By order dated January 6, 1976, said Court extended the time to file a Petition for Rehearing to and including January 21, 1976. See notice in the Appendix. Petition for Rehearing was filed on January 20, 1976, and denied on January 27, 1976. See copies of Petition and notice in the Appendix. This Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether petitioner's due process right to present evidence was violated by the application of Mississippi's locality rule so as to exclude from the jury's consideration petitioner's only expert medical testimony as to negligent medical treatment.

STATEMENT OF THE CASE

Petitioner sued respondents in the Circuit Court of the Second Judicial District of Jones County, Mississippi, alleging that Dr. E. J. Holder, Laurel Bone and Joint Clinic, Laurel, Mississippi, in treating petitioner for a comminuted (multiple-fragment) fracture of the left humerus (upper arm), was negligent in failing properly to reduce the fracture, in failing properly to obtain internal fixation by pins, and in failing properly to immobilize the fracture sufficiently and long enough for it to heal. Petitioner further alleged that as a direct and proximate result of the said negligence, petitioner suffered a non-union and complete separation of the fracture, leaving her with a floppy, unusable and deformed left forearm.

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In support of her allegations, petitioner offered at trial the testimony of Dr. Byron Unkauf, an orthopedic surgeon certified by the American Board of Orthopedic Surgery who has practiced in New Orleans, Louisiana, since 1949 and who has taught orthopedics at Tulane University in New Orleans. Dr. Unkauf testified, outside the presence of the jury, that in his professional opinion there was not an adequate reduction of the fracture (R. 125-127, 134), that one of the pins placed in petitioner's arm by Dr. Holder was improperly positioned so as to preclude the possibility of healing (R. 128-129, 134, 135), and that the cast and the pins were removed too early for anything but a non-union of the fracture to occur (R. 127-128, 135).

Dr. Unkauf further testified that although he was not personally familiar with the general practice of medicine in Laurel, Mississippi, he was personally familiar with the standard of care in the specialty of orthopedic surgery and that said standard is uniformly set by the American Board of Orthopedic Surgery in all fifty states (R. 118-119, 133, 134).

The trial court, however, applied the locality rule so as to exclude Dr. Unkauf's testimony from the jury (R. 118, 138-140). The court stated, in support of its ruling, that,

> Negligence is proven in a case of this type where it is shown that the defendants rendered medical treatment to a patient and failed to apply the degree of care and skill ordinarily employed in similar circumstances by physicians and surgeons in the same speciality and in the same locality, and this witness, the evidence shows, practices in New Orleans and for the purpose of this Motion the Court will take judicial notice that New Orleans is a metropolitan area some one hundred fifty miles from Laurel, Mississippi (R. 139).

As a result of the trial court's ruling, petitioner was left without any expert medical testimony before the jury. Consequently,

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the only evidence of negligence presented to the jury was the testimony of petitioner and petitioner's daughter-in-law that respondent Dr. Holder had told them he put the pins in wrong (R. 318, 330, 332), a statement denied, of course, by Dr. Holder (R. 193-194, 263-264). The only question allowed to go to the jury, therefore, was whether Dr. Holder had been negligent in his placement of the pins (R. 545-546). Even this issue was presented only on the basis of petitioner's and her daughter-in-law's assertions, without any supporting medical testimony as to how the pins might have been misplaced. Petitioner was nonsuited as to her allegations of negligence in the reduction of the fracture and in the length and sufficiency of the immobilization, despite ample testimony by all of respondents' witnesses that reduction and immobilization of a fracture certainly affect the final medical result.

Two of respondents' own witnesses, Dr. William Gary Giles, a Board-certified orthopedic surgeon from Hattiesburg, Mississippi, and Dr. Cleve Johnson, a Board-certified orthopedic surgeon in respondents' orthopedic clinic, testified that the standard of care for fracture treatment is uniform nationwide (R. 426-427, 516) and that, in their respective opinions, the course of treatment applied by respondent Dr. Holder conformed to this nationwide standard.

Dr. Giles, on direct examination by respondents' attorney, testified as follows:

> Q. Is that good alignment, or good orthopedic work there, sir?
>
> A. I believe that this would be quite satisfactory on the fracture that you had anywhere that you are. Any teaching institution would consider that fine.
>
> Q. Let's confine it to Laurel, Mississippi, if you would.
>
> A. This is quite good for Laurel, Mississippi, or anywhere else. (R. 426-427)

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On cross-examination, Dr. Giles testified as follows:

> Q. Doctor, is it normal standard care of a patient in orthopedic surgery, or the standard of care given by an orthopedic surgeon in Laurel any different from that care given in Hattiesburg?
>
> A. Basically it is not. (R. 438)

The trial court then sustained respondents' counsel's objections to any further questions aimed at eliciting the existence of a broader than "local" standard of care in the treatment of fractures (R. 438-439).

On cross-examination, Dr. Johnson testified for respondent as follows:

> Q. Doctor, is there any material difference between the due and proper and standard treatment given to patients by orthopedists in Laurel, Mississippi, as compared to say Hattiesburg or Jackson?
>
> A. In this particular fracture I think that this is the standard treatment used nationwide, from what he described. It is written up in all the textbooks, and so I would have to say that if they weren't doing it like this other places I think they would be wrong. (R. 516)

Respondent Dr. Holder himself testified to a uniform standard in treatment of fractures as follows:

> Q. All right, sir. Doctor, how did you arrive at the type of treatment that you used to treat a fracture such as Mrs. Knights?
>
> A. Because this is the type that is usually used by most all orthopedists. (R. 94)

On the one issue of negligence submitted to it, and in the absence of any expert medical testimony for the petitioner, the jury returned a verdict for respondents.

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Petitioner challenged the trial court's application of the locality rule to exclude her only expert medical testimony in her timely Motion for New Trial (R. 591). The trial court overruled said motion without opinion (R. 597).

From the judgment on the trial court verdict, petitioner appealed to the Supreme Court of Mississippi. In her Assignment of Errors on appeal, petitioner again challenged the trial court's application of the locality rule to bar her only expert medical testimony. The Court affirmed the jury verdict and judgment of the lower court without opinion (App., *infra*, p. A-2).

On Petition for Rehearing petitioner raised only one issue for the Mississippi Supreme Court's consideration. Petitioner asserted that said Court had erred as a matter of law in failing to reverse the lower court judgment for error in the exclusion of petitioner's only expert medical testimony. Petitioner submitted that

> the evidentiary ruling of the lower court in excluding said testimony was contrary to state law and resulted in fundamental unfairness to petitioner in violation of her due process right to a fair trial guaranteed by the Mississippi Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, for which reasons the judgment of the lower court must be reversed (App., *infra*, p. A-7).

Said Court denied the Petition for Rehearing, submitted to it on the one issue now before this Court on Petition for Writ of Certiorari, without opinion (App., *infra*, p. A-8).

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REASON FOR GRANTING THE WRIT

The Mississippi Supreme Court in this case has decided a federal question of substance in a way which is probably not in accord with applicable decisions of this Court.

ARGUMENT

Petitioner asserts that she was thwarted in her attempt to prove negligence on the part of respondent Dr. Holder by the strict application of the Mississippi rule of evidence known as the locality rule. Petitioner contends that the application of this evidentiary rule in the circumstances of this case rendered her trial fundamentally unfair and deprived her of due process of law by denying her the opportunity to present evidence in her own behalf.

The right to present evidence in one's own behalf has long been recognized as an essential aspect of the fair hearing required by the due process clause of the Fourteenth Amendment of the United States Constitution. *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); *Baltimore & Ohio Railroad Company v. United States*, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1935).

It is likewise clear that a State's evidentiary rules or procedures may not be applied, under the guise of regulating the presentation of evidence, to preclude from a party a reasonable opportunity to submit to a jury in his behalf all of the facts bearing upon an issue which involves an interest within the contemplation of the "liberty and property" language of the Fourteenth Amendment. *Chambers v. Mississippi, supra; Mobile,*

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Jackson & Kansas City Railroad Company v. Turnipseed, 219 U.S. 35, 55 L. Ed. 78 (1910).

In *Mobile, J. & K.C. Railroad Company v. Turnipseed, supra* at 55 L. Ed. 80-81, this Court articulated the standard for compliance of a state rule of evidence with the due process clause, as follows:

> If a legislative provision, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process has been denied him.

Conversely, where a party has been precluded from presenting his case, application of a particular rule of evidence may, in the totality of circumstances of that case, operate to deprive him of due process of law. *Chambers v. Mississippi, supra*, 35 L. Ed. 2d at 313.

In this case, petitioner's effort to present expert medical testimony in support of her claim of negligent medical treatment by respondent Dr. Holder was thwarted by the application of Mississippi's common-law locality rule. The history of the locality rule and recent developments concerning this rule of evidence are summarized at 37 A.L.R.3d 420 *et seq.* and 1975 Supplement. In summary, the original "strict locality rule," and the one which was applied in this case, provided that the proposed expert witness in a medical malpractice case must be familiar with the standard of care possessed and exercised by physicians and surgeons in the defendant's own community of locality.

The rule is based on the once-applicable theory that a doctor in a small or rural community did not have the same opportunity and resources as did a doctor practicing in a large city to keep abreast of advances in his profession; hence, he should not be

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held to the same standard of care and skill as that employed by doctors in other communities or in larger cities.

However, the trend in an ever-growing number of jurisdictions is toward various modifications of the rule to conform to changed conditions in medical care. As the dissemination of medical information has become quicker and methods of treatment have become more uniform, the courts have moved toward a decreased reliance on a strict geographic standard of care. For example, many jurisdictions use a "same or *similar* locality" rule. Other jurisdictions apply a "general neighborhood or vicinity" rule. Still other jurisdictions have entirely abandoned a geographic standard of care. 37 A.L.R.3d 420 *et seq.* and 1975 Supplement.

In the present case, petitioner does not seek any general ruling in derogation of the respect traditionally accorded to the States in the establishment and implementation of their own evidentiary rules in civil trials. Nor does petitioner challenge the locality rule in general on due process grounds. Rather, petitioner contends that application of the strict locality rule to the circumstances of this case denied petitioner her due process right to present evidence because the testimony showed that petitioner's proposed expert was indeed familiar with the standard of care for treatment of fractures in Laurel, Mississippi.

Petitioner asserts that the testimony of respondents' own witnesses and of respondent Dr. Holder himself corroborates the testimony of petitioner's expert medical witness as to the existence of a uniform, nationwide standard of care in the field of orthopedics generally and in the treatment of fractures specifically. Thus, the testimony of respondents' own witnesses showed that plaintiff's witness, as a Board-certified orthopedic surgeon in New Orleans, Louisiana, *was* familiar with the standard of care, skill and knowledge of the orthopedic surgeons within the area of Laurel, Mississippi. Consequently, the ex-

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clusion of the testimony of petitioner's witness as to his knowledge of that uniform standard and as to his opinion about whether that standard was satisfied by respondent Dr. Holder was an erroneous application of the locality rule which operated to deprive petitioner of her due process right to submit her case to the jury. The fundamental unfairness to petitioner was accentuated in this case by the trial court's admission of the testimony of respondents' witnesses as to the existence of a uniform, nationwide standard with which respondent Dr. Holder's treatment of petitioner had complied.

The trial court in the present case strictly defined Laurel, Mississippi, as the locality in question and, in ruling to exclude the testimony of petitioner's expert, took judicial notice that New Orleans, Louisiana, where the proposed expert had practiced orthopedic surgery for 25 years, is a metropolitan area "some one hundred fifty miles" from Laurel (R. 139).

The trial court did not, however, properly take into account the testimony of respondents' own witnesses and of respondent Dr. Holder himself as to the existence of a uniform, nationwide standard in the treatment of fractures.

All of respondents' expert witnesses, including respondent Dr. Holder himself, but with the exception of Dr. Edwin H. Cole whose testimony was excluded because he was not an orthopedic specialist (R. 543), were orthopedic surgeons certified by the American Board of Orthopedic Surgery (R. 31-32, 145, 416, 495, 506) and all claimed familiarity with the standard of care of orthopedic surgeons in the Laurel area (R. 144-145, 414, 496, 506).

Petitioner's witness, Dr. Byron Unkauf, was likewise a Board-certified orthopedic surgeon (R. 110), who testified to a familiarity with the standard of care in Laurel, Mississippi, based on the nationwide uniformity of standards for orthopedic speciali-

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zation and treatment of fractures as prescribed by the American Board of Orthopedic Surgery (R. 118-119, 133, 134). The testimony of three of respondents' witnesses, including respondent Dr. Holder himself, corroborated Dr. Unkauf's testimony as follows:

Dr. Holder, on direct examination as an adverse witness by petitioner's counsel, testified,

> Q. All right, sir. Doctor, how did you arrive at the type of treatment that you used to treat a fracture such as Mrs. Knight's?
>
> A. Because this is the type that is usually used by most all orthopedists. (R. 94)

Dr. William Gary Giles, on direct examination by respondents' counsel, testified,

> Q. Is that good alignment, or good orthopedic work there, sir?
>
> A. I believe that this would be quite satisfactory on the fracture that you had anywhere that you are. Any teaching institution would consider that fine——

[Note that Dr. Unkauf testified that he taught orthopedics at Tulane University in New Orleans (R. 110).]

> Q. ——let's confine it to Laurel, Mississippi, if you would.
>
> A. This is quite good for Laurel, Mississippi, or anywhere else. (R. 426-427)

Dr. Cleve Johnson, an orthopedic surgeon at the Laurel Bone and Joint Clinic, testified on cross-examination,

> Q. Doctor, is there any material difference between the due and proper and standard treatment given to patients by orthopedists in Laurel, Mississippi, as compared to say Hattiesburg or Jackson?

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> A. In this particular fracture I think that this is the standard treatment used nationwide, from what he described. It is written up in all the textbooks, and so I would have to say that if they weren't doing it like this other places I think they would be wrong. (R. 516)

All three of these doctors testified that in their professional opinions Dr. Holder had satisfied this uniform standard of care (R. 365, 423, 511).

The testimony set out above was freely volunteered by respondents' witnesses. Indeed, the efforts of petitioner's counsel to elicit further testimony as to this nationwide standard of care were repeatedly thwarted by the trial court's sustaining of respondents' objections (R. 94-95, 145-146, 438-439).

In this case, the overwhelming prejudice to petitioner caused by the trial court's exclusion of her only expert medical testimony is clear. Out of the presence of the jury, petitioner's witness, Dr. Unkauf, testified as to Dr. Holder's negligence in the following respects: inadequate reduction of the fracture (R. 125-127, 134); improper and inadequate positioning of one of the pins placed in petitioner's arm for the purpose of internal fixation, so as to preclude the possibility of proper healing (R. 128-129, 134, 135); and premature removal of the cast and pins in the absence of sufficient evidence of healing, thus precipitating the non-union of the fracture (R. 127-128, 135).

Without this testimony, petitioner's only evidence of negligence allowed before the jury was her own and her daughter-in-law's testimony, without any supporting expert testimony, that Dr. Holder had told them he put the pins in wrong (R. 193-194, 263-264). Dr. Holder denied having made such a statement (R. 318, 330-332) and was allowed ample expert testimony, based on the standard of care in Laurel and "anywhere else," to show that the pins were not put in wrong. Petitioner was non-suited as to all other allegations of negligence, and suffered an adverse jury verdict as to the one issue of negligence the jury considered.

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Petitioner submits that the trial court's exclusion of petitioner's only expert medical testimony resulted in fundamental unfairness to petitioner by depriving her, under the guise of regulating the presentation of evidence, of a reasonable opportunity to present her case to the jury. As set out in the Statement of the Case hereinabove, this issue was properly before the Mississippi Supreme Court and was decided, by affirmance of the trial court judgment and by denial of the Petition for Rehearing addressed solely to the issue in question, in a manner not in accord with fundamental due process guarantees. For this reason, the decision of the Mississippi Supreme Court should be reversed.

Respectfully submitted

WILLIAM SEBASTIAN MOORE
514 Barnett Building
Jackson, Mississippi 39201

MARTHA BERGMARK
224 Second Avenue
Hattiesburg, Mississippi 39401
Attorneys for Petitioner

Certificate of Service

Pursuant to Supreme Court Rule 33.1, I hereby certify that I have caused three copies of this Petition for Writ of Certiorari to be deposited in a United States Post Office or Mail Box, with first class postage prepaid, addressed to Mr. Dorrance Aultman, Attorney at Law, P. O. Box 750, Hattiesburg, Mississippi 39401, Counsel of Record for Respondents, on this 22nd day of April, 1976.

.....
Attorney for Petitioner

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APPENDIX

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APPENDIX 1

In the Supreme Court of Mississippi

Monday, December 22, 1975
Mrs. Ethel Knight

No. 48,385 vs.

E. J. Holder, M. D., Individually and E. J. Holder, M. D. and

James C. Bass, M. D. D/B/A Laurel Bone and Joint Clinic

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court, Second Judicial District of Jones County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 17th day of April, 1974—be and the same is hereby affirmed. It is further ordered and adjudged that the appellant and J. T. Speed and Troy Carter, sureties on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.

Minute Book "BR" Page 319.

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APPENDIX 2

In the Supreme Court of Mississippi

Decisions Handed Down December 22, 1975

48,385 Mrs. Ethel Knight v. E. J. Holder, M.D., Individually, and E. J. Holder, M.D., and James C. Bass, M.D., d/b/a Laurel Bone and Joint Clinic; Circuit, Jones; Affirmed.

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APPENDIX 3

Supreme Court of Mississippi

Julia H. Kendrick, Clerk
Jackson, Mississippi
Yvonne P. Burnham, Deputy Clerk
P.O. Box 117

January 6, 1976

Andalman, Bergmark, Adelman & Steiner
Attorneys at Law
224 Second Avenue
Hattiesburg, Mississippi 39401

Re: Mrs. Ethel Knight vs. E. J. Holder, M.D., et al.
No. 48,385

Gentlemen:

This is to advise that additional time has been granted by the Court in which to file Petition for Rehearing in the above-styled cause. Petition for Rehearing will be filed on or before January 21, 1976.

Sincerely,

/s/ Julia H. Kendrick
(Mrs.) Julia H. Kendrick
Clerk

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cc: Honorable Dan McIntosh, III
Attorney at Law
P. O. Box 554
Collins, Mississippi 39428

Honorable Kenneth E. Crawford
Attorney at Law
P. O. Box 837
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Messrs. Gibbes, Graves, Mullins, Bullock & Ferris
Attorneys at Law
P. O. Box 2008
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Messrs. Aultman, Pope, Aultman, Van Slyke & Tyner
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P. O. Box 750
Hattiesburg, Mississippi 39401

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APPENDIX 4

In the Supreme Court of Mississippi

Mrs. Ethel Knight,

Petitioner,

vs. Cause No. 48,385

E. J. Holder, M.D., Individually, and E. J. Holder, M.D., and James C. Bass, Jr., M.D., d/b/a Laurel Bone and Joint Clinic,

Respondents.

Petition for Rehearing

Petitioner Ethel Knight, by and through her Attorneys, petitions this Court for a rehearing in her case pursuant to Rule 14 of the Mississippi Supreme Court and in support of her petition would show the following, to wit:

1. Petitioner appealed to this Court from the jury verdict and judgment against her in her medical malpractice suit against the respondents in the Circuit Court of the Second Judicial District of Jones County. On December 22, 1975, this Court affirmed without opinion the judgment of the lower court. On January 6, 1976, the Court sustained petitioner's Motion for Enlargement of Time in which to file Petition for Rehearing and Supporting Brief, granting her until January 21, 1976, to file the said Petition and Brief.

2. Petitioner respectfully submits that this Court erred as a matter of law in failing to reverse the lower court judgment for error in the exclusion of plaintiff's only expert medical testimony. Petitioner submits that the evidentiary ruling of the lower court in excluding said testimony was contrary to state law and resulted in fundamental unfairness to petitioner in violation of

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her due process right to a fair trial guaranteed by the Mississippi Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, for which reasons the judgment of the lower court must be reversed.

3. Petitioner respectfully submits that this is an exceptional case in which justice requires this Court to reconsider the evidentiary issue raised herein.

4. Petitioner therefore respectfully requests that this Court enter an appropriate order setting this case for oral argument on the question of whether this Court erred as a matter of law in failing to reverse the lower court judgment for error in the exclusion of plaintiff's only expert medical testimony.

Respectfully submitted

ANDALMAN, BERGMARK, ADELMAN
& STEINER
/s/ By: MARTHA BERGMARK
224 Second Avenue
Hattiesburg, Mississippi 39401
Attorneys for Petitioner

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APPENDIX 5

In the Supreme Court of Mississippi

Tuesday, January 27, 1976, Court Sitting

Mrs. Ethel Knight

No. 48,385 vs.

E. J. Holder, M. D., et al.

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same En Banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

Minute Book "BR" Page 342.

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APPENDIX 6

In the Supreme Court of Mississippi

Decisions Handed Down January 27, 1976

48,385 Mrs. Ethel Knight v. E. J. Holder, M.D., Individually, and E. J. Holder, M.D., and James C. Bass, Jr., M.D., d/b/a Laurel Bone and Joint Clinic; Circuit, Jones; Petition for Rehearing Considered En Banc and Denied.

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